Supreme Court, U.S.
FILED
APR 9 1999
CLERK

(H)

No. 98-1438

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

THE CITY OF CONCORD,

Petitioner,

v.

NEIL S. HARDIN,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CRAIG F. ANDERSEN
Counsel of Record
R.M. BONNIFIELD
KENT C. PARR
ANDERSEN, BONNIFIELD & COTTLE
1320 Willow Pass Road, Suite 500
Concord, California 94520
Tel: (925) 602-1400
Fax: (925) 825-0143
Attorneys for Amicus Curiae

16pp

TABLE OF CONTENTS

I. INTERESTS OF AMICI

A. Identification of Amici 1
B. Description of Amici's Form of Government 1
C. City Manager is Chief Operating Officer 2
D. City Managers Serve at Pleasure of Amici's City Councils 2
E. Importance of Preserving City Councils' Uncontrolled Discretion Over Appointees 2
F. Amici Grant City Managers the Same Vacation/Sick Leave Benefits Granted to Civil Service Employees 3
G. Brief Description of Lower Courts' Title VII Error and Impact Upon Amici 3
H. Brief Description of Lower Courts' First Amendment Errors and Their Impact Upon Amici 4

II. ARGUMENTS

THE LOWER COURTS' RULINGS SEVERELY INTERFERE WITH AMICI'S DISCRETIONARY RELATIONSHIP WITH ITS APPOINTEES

A. Jurisdiction Over Title VII Claims Conferred Upon District Courts 5
B. The Policymaker Exemption 5
C. Purpose of the Policymaker Exemption 6
D. The District Court Committed Clear Error When It Concluded That an Appointee's Participation in Vacation and Sick Leave Benefits Renders the Appointee Part of the Civil Service 7

THE LOWER COURTS' FIRST AMENDMENT RULINGS CHILL PUBLIC CRITICISM OF APPOINTEES THAT HAVE FILED CLAIMS

A. Municipalities Have a Duty to Oversee and, Where Necessary, Criticize Performance of Their Appointees 9
B. First Amendment Prohibits Civil Liability for Debate About Public Figures 9
C. Lower Courts' Rulings Violate the First Amendment by Imposing Civil Liability for Public Debate About a Public Figure 10
D. Lower Courts' Rulings Chill Public Criticism and Debate 10

III. CONCLUSION 11

TABLE OF AUTHORITIES

Page

Federal Case Authorities

Decision No. 79-8, October 20, 1978
[26 F.E.P. Cas.(BNA) 1760] 6

Hustler Magazine v. Falwell,
485 U.S. 46, 53, 56 (1988) 9

NAACP v. Claiborne Hardware Co.,
458 U.S. 886, 913 (1982) 9

New York Times v. Sullivan,
376 U.S. 254 (1964) 9

State Case Authorities

Allen v. McKinley (1941)
18 Cal.2d 697, 705, 117 P. 2d 342, 347 8

Welch v. City of Long Beach, (1952)
109 Cal.App.2d 561, 564, 241 P.2d 26, 28; 1; 2

Federal Statutory Authorities

2 U.S.C.
§ 1220(b) 3; 5
§ 1220(c-d) 5

28 U.S.C.
§ 1331 5

TABLE OF AUTHORITIES

Page

42 U.S.C.
§ 1981a(c) 5
§ 2000e(f) 3; 5
§ 2000e-5(f)(3) 5

State Statutory Authorities

CAL. GOV'T. CODE
§ 36506 2

CONCORD MUNICIPAL CODE
§ 2206A 2

CONCORD MUN. CODE
§ 11306-11309; 11304 8

Treatises

3 MCQUILLIN MUNICIPAL CORPORATIONS
§ 12.31 (3d ed. 1990) 1; 2

I
INTERESTS OF AMICI

A. Identification of Amici.

Amici are thirty seven cities and counties located in the State of California: the City and County of San Francisco, and the Cities of San Diego, Santa Clara, Laguna Beach, Napa, Oceanside, Palm Desert, Alameda, Monterey, Imperial Beach, Town of Tiburon, Merced, Los Altos, Carlsbad, Lafayette, Madera, Antioch, Redlands, Chula Vista, Mountain View, Eureka, Riverside, Avalon, Truckee, Rialto, Hughson, Yreka, El Cajon, Atherton, Gustine, National City, Lakewood, Irwindale, San Jacinto, Delano, Moreno Valley and Walnut Creek.

B. Description of Amici's Form of Government.

Like Appellant City of Concord ("Concord"), Amici have a Council-Manager form of government. In most cases, the mayor is a ceremonial figurehead member of the City Council. The mayor has but one vote on the City Council and does not represent an independent executive branch of government.

C. City Manager is Chief Operating Officer.

Like Concord's City Manger, Amici's city managers are their chief executive officers: they manage the city's business, execute city policy, assist with the formulation of city policy, prepare budgets, manage city personnel, prepare agendas and perform numerous other traditional executive functions. The City Manager is clothed with executive and administrative functions and duties, and is the administrative head of a municipal government. (See Welch v. City of Long Beach, (1952) 109 Cal.App.2d 561, 564, 241 P.2d 26, 28; 3 E. McQuillin, Municipal Corporations, section 12.31 (3d ed. 1990). As the

administrative head of a city, a city manager "must of necessity exercise discretionary powers in the management of city affairs and is not... a mere ministerial figure-head." (Welch v. City of Long Beach, supra, 109 Cal.App.2d at 564, 241 P. 2d at 28). The city manager "is an officer and not an employee, and the position is that of an office, and not an employment." (3 McQuillin, Municipal Corporations, section 12.31 (3d ed 1990).

D. City Managers Serve at Pleasure of Amici's City Councils.

City Managers (and other policy making appointees)[1] serve with no promise of tenure or due process rights. Instead, appointees serve pursuant to a contract that provides for service at the complete and unfettered discretion of the city council. Appointees may be removed from office in the Council's "uncontrolled discretion." (See, e.g., Concord Municipal Code, section 2206A; see also Cal. Gov't. Code, section 36506).

Therefore, appointees are not within the protection of the civil service system. There are no notice or hearing rights. They may be terminated or disciplined at any time, for any reason, or for no reason.

E. Importance of Preserving City Councils' Uncontrolled Discretion Over Appointees.

The unrestrained discretion to hire and fire appointees serves a vital government interest of all Amici: elected officials must be satisfied that their appointees are executing the policy

[1]City Managers and other policymaking appointees shall collectively be referred to as "appointees".

objectives the elected officials seek to implement on behalf of the electorate. This requires a complex weighing of political, policy, budgetary and other considerations that the electorate entrusts to their elected officials. The cumbersome procedures of the civil service would frustrate elected officials' responsiveness and service to the electorate if they were applied to high level political appointees such as city managers. These factors carry obvious implications upon the principle of democratic governance.

For those reasons, Amici must zealously protect their discretion over the hiring and firing of appointees.

F. Amici Grant City Managers the Same Vacation/ Sick Leave Benefits Granted to Civil Service Employees.

Concord grants its City Manger the same vacation and sick leave benefits it grants to its civil service employees. This is a common provision in city manager employment contracts, including many of Amici's.

G. Brief Description of Lower Courts' Title VII Errors and Impact Upon Amici.

The District Court decided that the grant of vacation/sick leave benefits to a city manager made her "subject to the civil service laws"[2] and thus outside Title VII's "Policymaker Exemption" described below. As a result, the District Court found that it had jurisdiction to entertain the City Manager's Title VII claim before a jury.[3] The Ninth Circuit refused to address this issue.

---

[2]See 42 U.S. C. section 2000e(f) which exempts from Title VII's coverage "appointees on the policymaking level...not subject to the civil service laws of a State government."

[3]If Title VII's elements for District Court jurisdictions are not met, then jurisdiction for trial rests in the EEOC. (2 U.S.C. sec 1220(b))

"Subject to the civil service laws" was never intended by Congress to include true appointees who happen to participate in vacation and sick leave benefits. This violates the obvious meaning of "subject to the civil service laws." It also frustrates Congress' intent to preserve the sensitive appointee-city council relationship. That intent is found in Congress' providing appointees the limited remedy of EEOC review, not a District Court jury trial. (See I(B) below).

The lower courts' rulings are a tremendous encroachment upon the discretion necessary for the administration of public policy through appointees. Congress was aware of that need for discretion when it crafted Title VII's "Policymaker Exemption". (See I(C) below).

H. Brief Description of Lower Courts' First Amendment Errors and Their Impact Upon Amici.

The lower courts incorrectly favored Title VII in its collision with the First Amendment in this case. Like Concord, Amici and its public officials have a responsibility to criticize their appointees' policy choices and job performance as they see fit. This is part of their watchdog duties over appointees and their responsibilities to their constituents. The District Court's rulings chill such criticism by admitting into evidence, as proof of retaliation, 1) the Mayor's public criticism of the City Manager's policy choices; 2) evidence that the Mayor orchestrated a letter writing campaign critical of the City Manager's policy choices; and 3) Concord's City Council's failure to publicly disagree with the Manager's criticisms and its failure to publicly praise the Manager's job performance.

Such rulings place an ominous chill upon the content of public debate. This is not a hypothetical threat to Amici. The seven figure judgement entered against Concord brings to the

forefront Amici's deep interest in this case. (See II below).

II
ARGUMENTS

THE LOWER COURTS' RULINGS SEVERELY INTERFERE WITH AMICI'S DISCRETIONARY RELATIONSHIP WITH ITS APPOINTEES.

A. Jurisdiction Over Title VII Claims Conferred Upon District Courts.

The Disctrict Courts have jurisdiction over Title VII claims. (See 42 U.S.C. section 2000e-5 (f)(3) (jurisdiction over Title VII claims; see also 28 U.S.C. section 1331 (general federal question jurisdiction); see also 42 U.S.C. section 1981a(c) (granting jury trial to Title VII claimants)).

B. The Policymaker Exemption.

The "Policymaker Exemption" of Title VII (42 USC sec. 2000e(f)) exempts from Title VII certain categories of claimants, including "appointees on the policymaking level…not subject to the civil service laws of a State government." (Id.)

Exempted employees are given remedies for discrimination as determined by a specialized administrative body, the EEOC, rather than the District Courts. (See 2 U.S.C. section 1220(b)). There is a limited right of review in the Courts of Appeal. (See 12 U.S.C. section 1220(c-d)).

C. Purpose of the Policymaker Exemption. The Equal Employment Opportunity Commission has summarized the purpose of the Policymaker Exemption:

The Equal Employment Opportunity Commission has summarized the purpose of the Policymaker Exemption:

> "In exempting policy-making appointees, Congress realized the necessity of allowing elected officials complete freedom in appointing those who would direct state and local departments and agencies. These individuals must work closely with elected officials and their advisors in developing policies that will implement the overall goals of the elected officials. In order to achieve these goals, an elected official is likely to prefer individuals with similar political and ideological outlooks. Congress intended to allow elected officials the freedom to appoint those with whom they feel they can work best.
>
> Decision No. 79-8, October 20, 1978 [26 F.E.P. Cas.(BNA) 1760].

The clear purpose of the Policymaker Exemption is to give public officials maximum freedom to interact with their appointees within the political arena, and to hire and terminate persons based upon political considerations. The Policymaker Exemption quite clearly reflects Congress' striking the balance in favor of allowing elected officials maximum freedom to interact with their appointees by exempting such appointees from Title VII.[4]

This, of course, does not mean that appointees, such as

[4]That balance resulted from Congress' weighing the benefits of an appointee's jury trial against the impediments that the mere threat of such trials can present to the operation of state and local governments.

city managers, cannot avail themselves of other state and federal remedies for sexual harassment. But it does mean that the only reasonable interpretation of the civil service requirement under the Policymaker Exemption is that Congress did not intend Title VII to apply to persons not subject to the civil service protections involving the hiring, termination and discipline of employees.

The fact that a city makes civil service regulations regarding work hours, vacation and holidays applicable to "exempt" appointees has nothing to do with the purpose of the Policymaker Exemption. To conclude otherwise would unduly hinder politicians from freely interacting with their appointees in the political arena.

D. The District Courts Committed Clear Error When It Concluded That an Appointee's Participation in Vacation and Sick Leave Benefits Renders the Appointee Part of the Civil Service.

The District Court correctly concluded that Hardin was an "appointee at the policymaking level" based upon her "significant policymaking functions as City Manager." App. A36. This meets the first of two prongs for the Policymaking Exemption.

The District Court found that the second prong for the Policymaker Exemption—that the appointee not be subject to the civil service laws—was not met due to Hardin's participation in Concord's vacation and sick leave policies. The Ninth Circuit would not review the issue.[5]

Congress is well aware of the two-tiered employment system used in thousands of municipalities across the nation.

[5]The Ninth Circuit's refusal to review this issue was on the grounds of waiver. Amici join Concord's arguments that this is a non-waivable issue of subject-matter jurisdiction. (Petition for writ of Certiorari, p. 14-15).

Typical of those is Concord's which divides its personnel system into "Competitive" (i.e., tenured positions following a probationary period) and "Exempt" (unprotected) categories. (Concord Mun. Code sec. 11306-11309; 11304).

Congress is also well aware that "Exempt" service does not equate with "uncompensated service". Exempt appointees are typically paid a salary and provided benefits pursuant to contract. Such a compensation package does not make one "subject to the civil service laws" as that phrase is used in Title VII's Policymaker Exemption. The "civil service laws" can only refer to the widely used civil service system which exists: 1) to abolish the so-called "spoils system" that subjected every public employee to the political whims of those elected to office; and 2) to increase the efficiency of the service by assuring the employees of continuation in office regardless of what party may then be in power. (See, e.g., Allen v. McKinley (1941) 18 Cal.2d 697, 705, 117 P. 2d 342, 347). Familiar characteristics of "civil service laws" include termination only for cause following a probationary period, and hiring/ promotion decisions based upon merit.

Congress did not intend Title VII to apply to appointees. Congress intended for appointees to be treated differently. Congressional intent is eviscerated by the District Court's ruling that Concord's providing vaction/sick leave benefits brings an appointee within Title VII's applicaton.

Certainly Congress did not intend to have the delicate balance upset upon a municipality's providing a vacation and sick leave benefits package to its policymaking appointees. Simply put, those benefits do not place one into the civil service.

THE LOWER COURTS' FIRST AMENDMENT RULINGS CHILL PUBLIC CRITICISM OF APPOINTEES THAT HAVE FILED CLAIMS

A. Municipalities Have a Duty to Oversee and, Where Necessary, Criticize Performance of Their Appointees.

Appointees are subject to the supervision and control of their respective municipalities. Those municipalities have a responsibility to the public to oversee, supervise, and where necessary, criticize the performance of appointees. Execution of this responsibility is the "check" upon the appointees' performance.

B. First Amendment Prohibits Civil Liability for Public Debate About Public Figures.

When criticism is leveled against public figures relating to public issues, it is protected speech. The First Amendment precludes civil liability on any theory for public debate about public figures not involving false statements of fact.[6] (Hustler Magazine v. Falwell, 485 U.S. 46, 53, 56 (1988)(emphasis added); New York Times v. Sullivan, 376 U.S. 254 (1964). Debate on matters of public concern rests on the highest rung of First Amendment values. (NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982)).

---

[6]No false statements of fact were present here, given the first jury's verdict against Hardin on her defamation claim, which has not been appealed. ER 461, 1709.

C. Lower Courts' Rulings Violate the First Amendment by Imposing Civil Liability for Public Debate About a Public Figure.

The lower courts' rulings pierce this First Amendment bedrock by admitting evidence of alleged retaliation consisting of: 1) Councilman Campbell's public criticism of Hardin's performance; 2) Campbell's alleged encouragement of his political supporters to criticize Hardin's job performance in letters to the editor; and 3) Concord's City Council's failure to publicly disagree with Hardin's criticisms, or its failure to publicly praise Hardin's job performance.

The issues about which Hardin was criticized are quintessential public issues: her use of public funds and her promotion of a police lieutenant.

D. Lower Courts' Rulings Chill Public Criticism and Debate.

The rulings force elected officials to think long and hard about publicly criticizing an appointee's performance, effectively cloaking appointee-claimants with a shield from public scrutiny and criticism. Who dares to publicly criticize an appointee who has filed a discrimination claim? Or one who merely threatens to file a claim? Once again, Amici are placed in a dilemma: shirk their responsibilities of overseeing appointees, or risk exposure by speaking out on public issues.

The lower courts' decisions in this case raises the specter that <u>any</u> criticism of a city manager can potentially lead to a Title VII claim. This obviously hinders council members from operating freely in the political arena to hire, dismiss and criticize appointees. Yet, criticism of a city manager on issues of public concern, while sometimes unpleasant, reflects harsh political realities that come with the position. Indeed, the right to criticize is a cherished right protected by the First Amendment.

As municipalities and cities, Amici occupy a special position: they must level criticism of appointees (and non-appointees) where they believe it is due. The exposure to which the lower courts' rulings place Amici is intolerable to the grand tradition of free speech and to their responsibility to supervise and manage appointees. Due to this dilemma, Amici would greatly benefit from this Court's review of this issue.

There must be no exposure for speaking out on public issues. There must be no exposure from encouraging members of the community to speak out on public issues. There must be no exposure for a city council refusing to support, oppose, or remain neutral on public issues.

Speech relating to public issues must remain protected.

III
CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: April 8, 1999

Respectfully,
CRAIG F. ANDERSEN,
Counsel of Record

ROBERT MICHAEL BONNIFIELD
KENT C. PARR
ANDERSEN, BONNIFIELD & COTTLE
Attorneys for Amici, the City and County of San Francisco, and the Cities of San Diego, Santa Clara, Laguna Beach, Napa, Oceanside, Palm Desert, Alameda, Monterey, Imperial Beach, Town of Tiburon, Merced, Los Altos, Carlsbad, Lafayette, Madera, Antioch, Redlands, Chula Vista, Mountain View, Eureka, Riverside, Avalon, Truckee,

Rialto, Hughson, Yreka, El Cajon, Atherton, Gustine, National City, Lakewood, Irwindale, San Jacinto, Delano and Moreno Valley, California.